1-1-2011

Florida v. HHS - U.S. Motion to Expedite

United States Department of Health and Human Services

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STATE OF FLORIDA, by and through
Attorney General Pam Bondi, et al.,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, et al.,

Defendants-Appellants.

No. 11-_____

No. 3:10-cv-91-RV (N.D. Fla.)

Appellants' Motion for Expedition

The federal government respectfully asks this Court to consider on an expedited basis its appeal from the district court's order of January 31, 2011, which held unconstitutional the minimum coverage provision of the Patient Protection and Affordable Care Act ("Affordable Care Act") and declared the Act invalid in its entirety.

On March 3, 2011, the district court stayed its ruling pending appeal, contingent upon the federal government's filing of a notice of appeal within seven days and a request for expedited review. The federal government filed a notice of appeal earlier today (March 8, 2011) and now asks that the Court expedite

proceedings and establish the following briefing schedule, with oral argument to follow on an expedited basis as determined by the Court:

Defendants' Opening Brief: due 4/18/2011

Plaintiffs' Response Brief: due 5/18/2011

Defendants' Reply Brief: due 6/1/2011 (as qualified below)

The proposed deadline for the reply brief assumes that plaintiffs will not renew on appeal, through cross-appeal or otherwise, claims or arguments not accepted by the district court. If that assumption proves incorrect, defendants may need additional time for the reply brief. We have consulted with plaintiffs' counsel, who advised us today that plaintiffs are not in a position to support or oppose this motion.

1. The Affordable Care Act is a comprehensive reform of our national health care system that includes hundreds of provisions. Plaintiffs are twenty-six states, two private citizens, and the National Federation of Independent Business ("NFIB"). Their amended complaint included six causes of action that challenged the constitutionality of several provisions of the Affordable Care Act.

The district court held that Congress lacked authority under its commerce power or taxing power to require that non-exempted individuals maintain a minimum level of health insurance coverage or pay a tax penalty. 26 U.S.C.A. § 5000A. The court thus held this minimum coverage provision invalid, although it rejected

plaintiffs' substantive due process challenge to the provision. The minimum coverage provision, which applies only to non-exempted individuals, and not to states or employers, will not go into effect until 2014.

The district court did not accept any of plaintiffs' other constitutional claims or arguments. In addition to rejecting plaintiffs' substantive due process challenge to the minimum coverage provision, the court granted the federal government's motion to dismiss plaintiffs' challenge to the employer responsibility provision, 26 U.S.C.A. § 4980H, which in specified circumstances will impose a tax penalty on large employers that fail to make adequate coverage available to their full-time employees if at least one full-time employee receives a tax credit to assist with the purchase of coverage through a health insurance exchange established under the Act. The court also granted the federal government's motion to dismiss plaintiffs' claim that provisions of the Act establishing health insurance exchanges, 42 U.S.C.A. § 18031, impermissibly "coerce" state governments. And, in its summary judgment ruling, the court likewise rejected plaintiffs' claim that the provision of the Act that will expand eligibility for the Medicaid program in 2014, 42 U.S.C.A. § 1396a(a)(10)(A)(i)(VIII), is impermissibly "coercive."

Notwithstanding the district court's rejection of all of plaintiffs' claims except for their Article I challenge to the minimum coverage provision, the court, on

January 31, 2011, issued a declaratory judgment stating that the Affordable Care Act is invalid in its entirety. The court acknowledged that, "[i]n a statute that is approximately 2,700 pages long and has several hundred sections — certain of which have only a remote and tangential connection to health care — it stands to reason that some (perhaps even most) of the remaining provisions can stand alone and function independently of the individual mandate." Op. 65. The court also recognized that, "because a ruling of unconstitutionality frustrates the intent of democratically-elected representatives of the people, the 'normal rule' — in the 'normal' case — will ordinarily require that as little of a statute be struck down as possible." *Id*. at 71-72. Nonetheless, based on "the unique facts of this case and the particular aspects of the Act," which present a "situation [not] likely to be repeated," *id.* at 74, the court held that the minimum coverage provision cannot be severed from any other provision of the Act and thus declared the entire Act invalid.

On March 3, 2011, on defendants' motion seeking clarification of the intended effect of the January 31, 2011 declaratory judgment, the court stated that it had intended the declaratory judgment to be treated as the practical equivalent of an injunction with respect to the parties to this case. The court recognized, however, that its ruling would be "extremely disruptive," Op. at 17, and, *sua sponte,* issued a stay

pending appeal, contingent upon defendants' filing of a notice of appeal within seven days of the clarification order and seeking expedited appellate review.

2. Consistent with that order, defendants filed a notice of appeal earlier today, and respectfully request that the Court adopt the expedited briefing schedule set forth above.

Expedition is warranted, and the briefing schedule proposed here is similar to that approved by the Fourth Circuit in *Commonwealth of Virginia v. Sebelius*, Nos. 11-1057 & 11-1058 (4th Cir.), which is the only other case in which a district court invalidated the minimum coverage provision. The Fourth Circuit will hear argument in the *Virginia* case in seriatim with *Liberty Univ., Inc. v. Geithner*, No. 10-2347 (4th Cir.), in which the district court upheld the minimum coverage provision. The Sixth Circuit, in *Thomas More Law Ctr. v. Obama*, No. 10-2388 (6th Cir.), also granted a request for an expedited oral argument date following the close of briefing. Like the district court in *Liberty University*, the district court in *Thomas More* upheld Congress's authority to enact the minimum coverage provision. The federal government also recently consented to an expedited briefing schedule similar to that proposed here in *Mead v. Holder*, No. 11-5047 (D.C. Cir.), in which the district court upheld the minimum coverage provision.

Expedition in this case is particularly warranted because of the district court's unprecedented severability ruling, which presents issues that the federal government has not previously addressed in appellate briefs and covers numerous provisions of the Act already in effect.

We believe that the requested schedule allows for adequate briefing of the significant questions raised by the court's adverse rulings. It is less clear that the schedule allows sufficient time for preparation of defendants' reply brief. The proposed deadline for the reply brief assumes that plaintiffs will not renew on appeal claims or arguments that were not accepted by the district court. If that assumption proves incorrect, defendants reserve the right to seek additional time for the reply.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2011, I filed the foregoing motion with the Court by federal express, overnight delivery and served copies on the following counsel by first class regular mail and email:

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